issued be served personally. In the present case the writ could not be personally served because no leave had been obtained to issue it, as rule 4 of Order II requires, when the defendant is out of the jurisdiction. Therefore, the order for substituted, service was irregular. If we were to hold that service effected in this way was regular we should render all the rules relating to service out of the jurisdiction absolutely useless. If a defendant was out of the jurisdiction the plaintiff would only have to obtain an order for substituted service of an ordinary writ, and then every other step in the action could proceed in the ordinary way."

In that case, however, the Court held that the defendant had waived the irregularity and was not entitled to have the judgment set aside.

Fry v. *Moore* was followed in *Wilding* v. *Bean* [5] from which I quote Lord Esher M.R.:—

"It was said, and I think rightly said, in *Fry* v. *Moore* that, where the writ cannot be served on a person directly, it cannot be served indirectly by means of substituted service. As long as the defendant is abroad, such a writ as this cannot be served upon her personally. Therefore it cannot be served by substituted service."

In the instant case, the writ itself could not have been served on the defendant. Hence substituted service of the writ on Mr. Athi Nahappan was void. The order of November 11, 1963 however, did expressly state that "notice of writ to be served out of the jurisdiction herein be served on Mr. Athi Nahappan", which was in fact not complied with. Substituted service of the notice of writ would have been proper and valid. As Lopes L.J. stated in *Wilding* v. *Bean*: "If the plaintiff could have established the fact that the defendant left England to evade service of the writ, I think the order for substituted service might have been sustained." Such a case of evading service had been made out by the plaintiff.

The proper order in the circumstances, therefore, will be an order setting aside only the service of the writ on Mr. Athi Nahappan and all proceedings subsequent thereto, but no order as to the rest of the application set out in the notice of motion. Costs of this application to defendant in any event.

Order accordingly.

Solicitors: *Skrine & Co.; Athi Nahappan & Co.*

LAM SOON OIL & SOAP MANUFACTURING LTD. v. IMPEX SYNDICATE LTD.

[F.C. (Barakbah C.J. (Malaya), Wee Chong Jin C.J. (Singapore) & Tan Ah Tah F.J.) April 6, 1964]

[Singapore — Federal Court Civil Appeal No. 56 of 1963]

Contract—F.O.B.—April/May option of seller—Nomination by buyer of last ship in May—Failure by seller to ship—Breach of contract.

Appeal—Question of fact—Grounds on which appellate tribunal may reverse trial Judge's finding.

The appellants entered into a written contract for the sale of 50 tons of palm oil to the respondents, F.O.B. Port Swettenham. One of the terms of the contract was that delivery was to be by shipment in April/May 1959 at the appellants' option. The respondents contended that by a telephone conversation with the appellants they had nominated a ship, as they were required to do, which was the last ship to leave Port Swettenham for the port of destination. The appellants denied that such nomination had been made. The trial Judge came to the conclusion that the respondents' version was to be believed and that the material evidence of the appellants was untrue.

On appeal it was argued that the conduct of the respondents subsequent to the alleged breach of the contract by the appellants was inconsistent with their claim that shipping instructions were given. It was particularly stressed that respondents had failed (1) to confirm in writing the oral instructions which they said they had given (2) to place on record that shipping instructions had not been complied with (3) to give notice to the appellants that they would have to buy on the open market and (4) on expiry of contract to give notice to the appellants that they treated the appellants as having repudiated the contract.

Held: these were matters brought out at the trial and therefore considered by the trial Judge when assessing credibility of witnesses. Taken as a whole they did not lead inescapably to the conclusion that the evidence of the respondents' witness was untrue.

Grounds on which an appellate court should act in reviewing the decision of a judge of first instance discussed.

Principles reiterated in *Tay Kheng Hong* v. *Heap Eng Moh Steamship Co. Ltd.* [1] followed.

Case referred to:—

(1) *Tay Kheng Hong* v. *Heap Eng Moh Steamship Co. Ltd.* [1964] M.L.J. 87, 91, 92.

FEDERAL COURT.

J. Grimberg for the appellants.

Kirpal Singh for the respondents.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal from the judgment of Ambrose J. in the High Court of Singapore dismissing the appellants' claim for damages for breach of a contract for the purchase of 50 tons of palm oil and awarding the respondents $3,375.00 by way of damages for the appellants' breach of contract in failing to ship the palm oil under the contract.

The contract, dated 13th April 1959, was for the sale by the appellants to the respondents of 50 tons Malayan red palm oil at $842.00 per ton F.O.B. Port Swettenham. One of the terms of the contract was that delivery was to be by shipment in April/May 1959 at the appellants' option.

The sole issue at the trial was whether on 13th May 1959 H. K. Doshi, the secretary of the respondents, telephoned Whang Tar Choung, the managing director of the appellants, and gave the latter oral instructions to ship the contract oil on a ship "Star Betelgeuse" calling at Port Swettenham on or about 20th May 1959. It was common ground that in April 1959 the respondents had given written instructions to the appellants to ship the oil on the "Straat Torres" a ship

expected to sail from Port Swettenham on 3rd May 1959 which sailing was later postponed to on or about the beginning of the second week of May 1959 and that the appellants had replied by letter dated 29th April 1959 that they would be able to ship the 50 tons only after the middle of May 1959.

Doshi gave evidence at the trial that on 13th May 1959 he spoke to Whang over the telephone, told him that the "Star Betelgeuse" would be calling at Port Swettenham on or about 20th May and that would be the last opportunity for May shipment from Port Swettenham and requested Whang to proceed in the matter as he had to fulfil a contract with Bombay for May shipment. According to Doshi, Whang over the telephone bluntly told him that the oil would not be available till the end of May.

Whang also gave evidence and according to him the respondents never during May 1959 gave any instructions, written or verbal, for the shipping of the 50 tons of palm oil. In respect of the crucial telephone conversation between him and Doshi on 13th May he said that Doshi inquired of him about the market price and shipments and when he could ship but denied that Doshi told him of the "Star Betelgeuse" being the last available steamer leaving Port Swettenham. He also denied that he told Doshi the appellants would only be able to ship at the end of May 1959.

The learned trial Judge accepted Doshi's evidence and found as a fact on the evidence that on the 13th May 1959 Doshi nominated the "Star Betelgeuse" for the shipment and gave instructions to Whang on the telephone for shipment of the contract oil by that steamer. He also found as a fact that Whang told Doshi in reply that the oil would not be ready till the end of May. He saw no reason to disbelieve Doshi's evidence and said that Doshi impressed him as a witness of truth. On the other hand the learned trial Judge found that Whang gave untrue evidence when he said that Doshi did not mention the ship "Star Betelgeuse" to him on the telephone on the 13th May 1959. The learned trial Judge in respect of other evidence given by Whang which was relevant to the main fact in issue used the expressions "I did not believe Whang's denial" and "that seemed to me to be obviously untrue".

The appellants now seek to reverse the judgment of Ambrose J. I can do no better than to refer to a passage in the judgment of the Privy Council delivered on the 14th January 1964 in the Singapore case of *Tay Kheng Hong* v. *Heap Eng Moh Steamship Co. Ltd.*[1] for a statement of the principles upon which an appellate Court should act in reviewing the decision of a judge of first instance:

"There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt* or *Thomas* v. *Thomas*: 'I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.' Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke* v. *Edinburgh & District Tramways Co. Ltd.*: 'In my opinion, the duty of an appeliate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.' Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion."

Before us counsel for the appellants argued that by reason of the failure of the respondents to do certain acts which an experienced business management would do, the inescapable inference would be that Doshi's narrative of the telephone conversation between him and Whang was untrue and the learned trial judge should have accepted Whang's narrative as the true one. He argued that the respondents had failed to do any of the following things:—

1. Failed to confirm in writing the oral shipping instructions.

2. Failed to place on record that their shipping instructions had not been complied with.

3. Failed to give the appellants notice that they would have to buy on the open market.

4. When the contractual period had expired failed to give the appellants notice that they treated the appellants as having repudiated the contract.

5. Ignored until 9th July 1959 the appellants' letter dated 11th June 1959 which was after the contractual period had expired and which called upon the respondents to give shipping instructions immediately.

In my opinion these are matters eminently for the trial judge to take into consideration when assessing the credibility of Doshi's evidence. From an examination of the printed evidence they are matters which were brought out at the trial and are some of the matters which the learned

trial judge must have taken into account when assessing the credibility of Doshi's evidence. I am not satisfied that these matters, though relevant for consideration, taken individually or collectively raised the inescapable inference that Doshi was not a truthful witness as regards what was said over the telephone on the 13th May 1959 and much less am I satisfied on all the evidence that these matters indicated that Whang was the truthful witness in respect of this particular telephone conversation.

In the face of the deliberate refusal of the trial judge to accept Whang's evidence on this telephone conversation as truthful, the considerations put forward by counsel for the appellants are not sufficient in my opinion to enable an appellate tribunal, on principles which have been so clearly laid down by the highest authorities, to reinstate Whang as a reliable witness and in the result this appeal must fail.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Solicitors: *Drew & Napier*; *Mallal & Namazie.*

Appeal dismissed.

GOLDEN HOPE RUBBER ESTATE LTD. v. KUPPUSAMY

[O.C.J. (Ong J.) April 9, 1964]

[K.L. — Civil Appeal No. 9 of 1963]

Workmen's Compensation—Weeding labourer returning home to collect proper tools—Accident at house resulting in death—Whether accident arose out of and in the course of employment—Workmen's Compensation Ordinance, 1952, ss. 4 & 39(2).

A female labourer attended dawn muster on the appellants' estate and following this went to her house to pick up the proper tools for the work she was going to do on that particular day. Whilst at her house she had a fall from which she died. There was abundance of uncontradicted evidence that the standing rule in the appellant estate was that all labourers should proceed direct after muster to their place of work and anyone found in breach of the this rule would not be given work for that day.

The respondent, the deceased's husband, claimed compensation under the Workmen's Compensation Ordinance and the employers, the defendants, denied liability. In these circumstances the Commissioner for Labour held an inquiry and made a finding for the respondent which finding was later adopted by an arbitrator acting under section 30 of the Ordinance. On appeal by reason of a certificate under section 39(2) the following questions had to be decided (a) whether the deceased's daily employment commenced from her attendance at muster and (b) if not whether in going to her place of work she should be deemed to have been acting in the course of employment.

Held: (1) the daily employment of labourers on the appellant estate commenced from the time the labourer reported at the place of work and not from the time he attended at the dawn muster. The accident to the deceased did not therefore occur at a time when her daily employment had commenced and could not therefore be said to have "arisen out of and in the course of employment";

(2) as the deceased had not commenced her daily employment at the time of the accident she could not be deemed to have been acting in the course of her employment at the time of her accident under section 4(1)(b) or section 4(1)(d).

Cases referred to:—

(1) *M'Garvey* v. *Caledonis Stevedoring Co. Ltd.* [1943] 1 All E.R. p. 611.

(2) *Ilkiw* v. *Samuels* [1963] 1 W.L.R. 991, 998.

The following cases were also cited in argument: *Jones* v. *Tarr*, [1926] 1 K.B. 25, 30; *Cross, Tetley & Co. Ltd.* v. *Catterall*, [1926] 1 K.B. 488; *Parker* v. *Owners of Ship "Black Roadk"* [1915] A.C. 725, 730; *Walters* v. *Stavely Coal & Iron etc.*, 105 L.T.R. p. 119; *Williams* v. *Sir C. G. Asshoton Smith*, 108 L.T.R. p. 200; *M'Garvey* v. *Caledonis Stevedoring Co. Ltd.* [1943] 1 All E.R. 611; *R.* v. *National Insurance (Industrial Insurance) Commissioner, Ex parte Richardson*, [1958] 2 All E.R. 689; *Upton* v. *Great Central Railway Co.* [1924] A.C. 302; *Lander* v. *British United Shoe Machinery Co. Ltd.*, 149 L.T.R. p. 395, 398; *Thomas* v. *Pentremawr Colliery Co. Ltd.*, 19 B.W.C.C. 331 (1926), 336; *Noble* v. *Southern Railway Co.*, 33 B.W.C.C. 176 (p. 181); *St. Helen's Colliery* v. *Hewitson*, [1924] A.C. 59.

The following authorities were also cited: Workmen's Compensation Regulations, 1953, Regns. 23, 25, 29; 34 *Halsbury* (2nd Ed.) p. 823; *Willis* (37th Ed.) on Workmen's Compensation p. 97 (Rules I. & II) 98, 99.

CIVIL APPEAL.

M. Shankar for the appellant.

P. G. Lim (Miss) for the respondent.

Cur. Adv. Vult.

Ong J.: This is an appeal from the decision of the President of the Sessions Court given by him as arbitrator, under section 30 of the Workmen's Compensation Ordinance, 1952. This appeal lies by reason of a certificate given by Gill J. under section 39(2).

Briefly, the question of law for determination is whether a female weeding labourer, who should have proceeded direct to her place of work after dawn muster, but had gone home instead to collect the proper weeding implements and there had a fall which resulted in her death, suffered an accident arising out of and in the course of her employment.

It was contended on behalf of the deceased's husband, who is the respondent in this appeal, that, even if it was contrary to standing orders of the employer for the deceased to have gone home after muster, nevertheless, by reason of the provisions of section 4(1)(d), the accident should be deemed to have arisen out of and in the course of her employment, because her going there was "for the purposes of and in connection with the employer's trade or business."

On the other hand counsel for the appellant argued that the decision was wrong in law because the accident, which occurred in the deceased's own private place of abode and which did not arise out of any risk incidental to her employment, cannot be deemed to have been an